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December 10, 2019

VIA FEDEX

Trade and Commercial Regulations Branch
Office of Trade, Regulations and Rulings
U.S. Customs and Border Protection
90 K Street NE, 10th Floor
Washington, DC 20229-1177

**Attn: Reema Bogin, Chemical, Petroleum, Metals and Miscellaneous Articles
Branch**

**Re: Comments in Opposition to CBP's Proposed Action to Limit the
Application of *Irwin Industrial Tool Company v. United States***

Dear Ms. Bogin:

On behalf of our client, Milwaukee Electric Tool Corporation ("Milwaukee Tool" or "the Company"), we hereby submit comments in opposition of United States Customs and Border Protection's ("CBP") proposal to limit application of the decisions by the Court of Appeals for the Federal Circuit ("CAFC") and the Court of International Trade ("CIT") in the case of *Irwin Industrial Tool Company v. United States*, 222 F. Supp. 3d 1210 (CIT 2017), motion for reconsideration *denied* in 269 F. Supp. 3d 1294 (2017), *affirmed* in 920 F. 3d 1356 (Fed. Cir. 2019). CBP proposes to limit the tariff classification determination in these cases to only those products before the courts and other locking pliers that are identical in all material respects to those in the *Irwin* case. See *Customs Bulletin and Decisions*, Vol. 53, No. 42, November 20, 2019.

Summary of the *Irwin* Case

In the *Irwin* case, the CIT reviewed the tariff classification of certain locking pliers, including straight jaw locking pliers, large jaw locking pliers, curved jaw locking pliers with and without wire cutters, and long nose locking pliers with wire cutters. CBP previously classified these products as "wrenches" under the *Harmonized Tariff Schedule of the United States*.

("HTSUS") Heading 8204, while *Irwin* advocated for classification as "pliers" under HTSUS Heading 8203. Upon review of the tariff term "wrench," the CIT determined that:

- a wrench should refer only to its physical attributes as a "hand tool that has a head with jaws or socks having surfaces adapted to snugly or exactly fit and engage the

head of a fastener (as a bolt-head or nut) and a singular handle with which to leverage hand pressure to turn the fastener without damaging the fastener's head;" and

- the products at issue were not "wrenches" because they incorporated two handles and jaws that did not necessarily snugly fit the head of a fastener.

Instead, the CIT classified the products as pliers because the tools "1) are versatile hand tools, 2) have two handles, and 3) have two jaws that are flat or serrated and on a pivot, which can be squeezed together to enable the tools to grasp an object."

The Government appealed the decision to the CAFC and argued that the CIT's definition of a "wrench" was too narrow because it would not include certain wrenches. For example, the definition would not include chain wrenches or oil wrenches, which do not have jaws at all, or pipe wrenches, which sometimes have two handles and have serrated jaws not designed for use on a fastener, or wrenches containing a second lever to lock the jaws around the pipe or fastener. Further, the Government believed that the court decisions ignored the physical difference between a wrench and pliers because the wrench has greater ability to apply torque to the grasped object. Nonetheless, the CAFC affirmed the CIT's decision.

Comments on CBP's Proposed Limitation of *Irwin*

CBP now seeks to limit application of the CIT and CAFC decisions in the *Irwin* case. For tariff classification purposes, CBP proposes that it will continue to define a wrench as a tool with a special ability to fixedly grasp an object and allow the user to exert a twisting or wrenching force. CBP suggests that the *Irwin* case will be limited to only those products before the courts and "to locking pliers that are identical in all material respects to those in *Irwin*." Pursuant to 19 U.S.C. § 1625(d) and the *Customs Bulletin*, Milwaukee Tool submits these comments in opposition, requesting that CBP clearly define those products and parameters that would be considered "identical in all material respects."

Milwaukee Tool previously filed protests on liquidated entries of its imported locking pliers in consideration of the on-going *Irwin* case. All of these protests remain suspended by CBP. The locking pliers imported by Milwaukee Tool include straight jaw locking pliers, curved jaw locking pliers, long nose locking pliers, and other similar products that provide serrated jaws and a mechanism to fix on an object. Pictures of representative products subject to Milwaukee Tool's protests are attached as **Exhibit A**. Milwaukee Tool believes that for tariff classification purposes its locking pliers at issue in the pending protests are "identical in all material respects" to the products at issue in *Irwin* and are properly classified under Heading 8203 by the CIT and affirmed by the CAFC. However, CBP's proposed limitation of the CIT and CAFC decisions without providing further definition and product parameters creates unnecessary ambiguity and the inability of importers to reasonably rely on the courts' tariff classification determinations.

The Company is concerned that CBP's proposed narrow application of the *Irwin* case will lead to unnecessary litigation and fails to provide clear definition for substantially identical products. Milwaukee Tool submits that for tariff classification purposes its locking pliers are "identical in all material respects" (*i.e.*, substantially identical features, components, functionality, and appearance) to the straight jaw locking pliers, curved jaw locking pliers, and long nose locking pliers at issue in the *Irwin* case. Accordingly, Milwaukee Tool's locking pliers meet the definition of "pliers" established by the CIT because they are "1) are versatile hand tools, 2) have two handles, and 3) have two jaws that are flat or serrated on a pivot, which can be squeezed together to enable the tools to grasp an object." *Irwin*, 269 F. Supp. 3d at 1302.

Milwaukee Tool respectfully requests that CBP provide clear guidance on the definition it intends to apply to classify similar products, notwithstanding the clear definitions provided by the CIT and CAFC. Among other things, Milwaukee Tool requests that CBP confirm that "locking pliers," as that term is commercially recognized, are appropriately classified under HTSUS heading 8203.

Locking pliers are pliers that can be locked into a single position, using an over-center action that allows them to be temporarily locked into place. They generally incorporate a bolt that adjusts the spacing of the jaws, and a lever that allows the jaws to release after locked. The jaws are typically serrated. The shape and size of the jaws can vary and are available in many different configurations, such as needle-nose locking pliers, locking clamps, straight, curved, and long nose. The locking pliers may include various grip configurations that provide comfort and support for the user. Representative pictures of Milwaukee Tool's locking pliers are attached.

Pursuant to 19 U.S.C. § 1625(d), we oppose the apparent narrow application by CBP of the CIT and CAFC decisions in *Irwin*, and respectfully request that CBP provide clear definitions of the locking pliers and other hand tools it believes remain properly classified under HTSUS heading 8203 consistent with the courts' decisions.

Very Truly Yours,

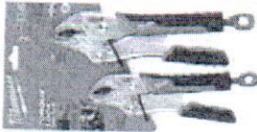










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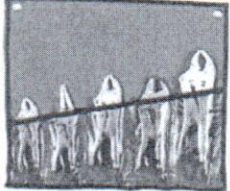

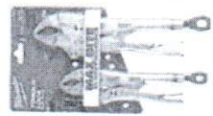
James Sawyer

Enclosure



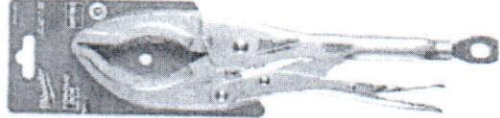







Milwaukee Tool - Locking Pliers

Model No	Description	Photo
48223402	2 PC Torque Lock™ Curved Jaw Locking Pliers Set 7" & 10"	
48223510	10" Torque Lock™ Straight Jaw Locking Pliers	
48223602	2 PC 10" Curved Jaw J and 6" Long Nose Torque Lock™ Locking Pliers Set	
48223409	9" Torque Lock™ Long Nose Locking Pliers with Grip	
48223410	10" Torque Lock™ Curved Jaw Locking Pliers with Grip	
48223610	10" Curved Jaw fast release locking plier	
48223610	10" Torque Lock™ Curved Jaw Locking Pliers with MAXBITE™	
48223406	6" Torque Lock™ Long Nose Locking Pliers with Grip	
48223520	10" Curved Jaw American release locking plier	
48223506	6" Long Nose fast release locking plier	
48223507	7" Straight Jaw American release locking plier	

Milwaukee Tool - Locking Pliers

Model No	Description	Photo
48223405	5" Torque Lock™ Curved Jaw Locking Pliers with Grip	
48223407	7" Torque Lock™ Curved Jaw Locking Pliers with Grip	
48223422	5" Curved Jaw fast release locking plier	
48223602	6" Long Nose/10" Curved Jaw LP	
48223421	7" Curved Jaw fast release locking plier	
48223690	10pc TORQUE LOCK™ Pliers Kit	
48223607	7" Torque Lock™ Curved Jaw Locking Pliers w/ Durable Grip	
48223695	5PC Roll Up Pouch Kit	
48223420	10 in. TORQUE LOCK Curved Jaw Locking Pliers	
48223702	2 Piece 7" & 10" Curved Jaw Locking Pliers with Maxbite	

Milwaukee Tool - Locking Pliers

Model No	Description	Photo
48223509	9" TORQUE LOCK™ Long Nose Locking Pliers	
48223810	10" TORQUE LOCK™ STRAIGHT JAW LOCKING PLIERS WITH GRIP	
48223541	12" TORQUE LOCK™ LARGE JAW LOCKING PLIERS	
48223504	4" TORQUE LOCK™ LONG NOSE LOCKING PLIERS WITH GRIP	
48223540	8" TORQUE LOCK™ Locking Seamer	
48223423	Locking Plier STD 4"	
48223807	7" TORQUE LOCK™ STRAIGHT JAW LOCKING PLIERS WITH GRIP	
48223707	7" TORQUE LOCK™ MAXBITE™ CURVED JAW LOCKING PLIERS WITH GRIP	
48223423	4" Curved Jaw Locking Pliers	
48223710	10" TORQUE LOCK™ MAXBITE™ CURVED JAW LOCKING PLIERS WITH GRIP	

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December 19, 2019

U.S. Customs and Border Protection
Office of Trade, Regulations and Rulings
Attention: Trade and Commercial Regulations Branch
90 K Street NE
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Washington, DC 20229-1177

VIA FEDEX
(202) 325-0118

Re: Written Comments of Apex Tool Group, LLC

Apex Tool Group, LLC (Apex), an importer of hand tools including locking pliers and wrenches, provides this response to the Customs Bulletin notice *Proposal to Limit The Decisions of the Court of International Trade and the Court of Appeals for the Federal Circuit in Irwin Industrial Tool Company v. United States*, 53 Cust. B. & Dec. No. 42, 32 (2019). Apex currently has protests pending before Customs regarding the classification of similar merchandise. For the reasons stated below, Apex disagrees with the proposed limitation as the Court decisions warrants acceptance by CBP as setting the correct classification for the merchandise involved and substantially similar merchandise.

Customs Should Clarify the Scope of the Proposal to Limit *Irwin*

In the Bulletin notice, Customs proposes that because some tools commercially known as "wrenches" do not fit within the Court's definition of "wrench," the Court's definition is too narrow. We disagree that this is a reason to limit the application of the meaning of "pliers" as settled by the *Irwin* litigation. The decision was based on the careful analysis and the Court established clear definitions for both pliers and wrenches.

The Court offers the following definition of pliers:

Pliers possess certain physical characteristics (two handles that can be squeezed together; two jaws that are flat or serrated and on a pivot, which may be locked or continuously gripped together to hold the object while using the tool) that are a function of their design an intended to use to grasp an object.

Irwin Industrial Tools v. United States, 222 F. Supp 3d 1210, 1224 (CIT 2017).

A definition of wrench was also provided:

A wrench is a hand tool that has a head with jaws or sockets having surfaces adapted to snugly or exactly fit and engage the head of a fastener (such as bolt-head or nut) and a singular handle with which to leverage and pressure to turn the faster without damaging the fastener's head.

Id. at 221. Collectively, we refer to the CIT and Federal Circuit Decisions as "*Irwin*."

We acknowledge that CBP's proposal is to limit *Irwin* to the specific entries before the courts "and to locking pliers identical in all material respects to those in *Irwin*." 53 Cust. Bull. & Dec. at 37. However, the scope of that proposal is unclear. It is possible that the intention of the Bulletin Notice is not to limit *Irwin* with respect to the conclusion that common figurations of locking pliers are properly classified as pliers. Rather, it may be that Customs is addressing only the definition of "wrench" provided by the Court. As CBP noted, there are tools commonly referred to as "wrenches" that do not have a jaws or sockets. That is true, for example, of chain wrenches and wrenches that use a strap or band to grip the item to be turned without applying significant compressive force. On the other hand, single handle tools that grip a workpiece without applying compressive force, such as the adjustable wrench shown in the CBP notice, would be included in the definition of "wrench" adopted by the Court. The third tool pictured in the notice, appears to be an adjustable pliers with serrated jaws, with a top jaw that pivots to grip the work piece. This latter tool appears to fit within the meaning of "pliers" as defined by the Court and should not be classified as a wrench.

Customs should clarify the intended scope of its limitation of *Irwin* to confirm that it will apply the definition of "pliers" as determined by the Court of Appeals for the Federal Circuit and the Court of International Trade to all products, including locking pliers, that satisfy that definition. Customs should, consistent with that conclusion, approve Apex's pending protests covering the classification of locking pliers. Customs can also state that it is limiting *Irwin* only to the extent the definition of wrenches established by the decisions does not fully account for the range of tools that are used to turn work pieces without applying compressive force including, for example, the chain wrench.

Customs Should Apply the Well-Reasoned Decision in *Irwin* to All Locking Pliers

To the extent CBP may be proposing a broader limitation of *Irwin* to the specific entries presented to the Court and to identical merchandise, CBP should abandon the proposal entirely or restrict it consistent with the discussion above. A wholesale limitation of the two federal court decisions in *Irwin* is a wasteful exercise of administrative effort. The decision of the Federal Circuit is binding on the Court of International Trade and can only be reversed by the full Court of Appeals sitting *en banc*, CAFC Rule 35(a)(1), or by the U.S. Supreme Court. Thus, in any subsequent litigation involving this or similar merchandise, the Court of International Trade is required to follow the decision of the Federal Circuit. The Federal Circuit's decision is based on a careful analysis of the tariff language for both pliers and wrenches and is unlikely to be changed by further litigation. As such, by limiting the application of *Irwin* to the merchandise specifically before the Court and materially identical products, CBP is forcing importers of similar products into duplicative litigation over the definition of "wrench" and "pliers" that is unlikely to result in a different outcome.

This unnecessary litigation creates inefficiency within the entire import and enforcement process. First, there is the initial burden created by forcing importers to continue to protest the classification of this merchandise and on Customs to presumably deny the protests. The Courts then must consider the same issue of the definition of "wrench" or "pliers" When the conclusion is dictated by the *Irwin* decision.

Furthermore, by limiting the application of the Court's decision, the CBP will create an unfair competitive advantage for Irwin and importers of its locking pliers as compared to importers of similar merchandise. Under the proposed limitation, only Irwin's pliers would receive the economically favorable treatment of under the tariff heading 8203 over the provision for wrenches and their competitors would be forced to pay higher duty rates for similar products. By creating this competitive advantage, importers are incentivized to litigate their classification disputes in order to achieve duty savings not available to their competitors. This incentive could cause a burden to the Courts due to an influx of litigation intended to harm competition rather than find the correct classification of merchandise and, as discussed above, is unlikely to produce a different result.

Further, limiting *Irwin* would also incur actual interest costs. When importers of similar merchandise are required to protest and litigate the failure of Customs to apply *Irwin*, interest costs will accrue. When the protests are ultimately granted in line with the reasoning of *Irwin*, these payments represent unnecessary costs to taxpayers which would be avoided if Customs applied *Irwin* to similar merchandise.

Conclusion

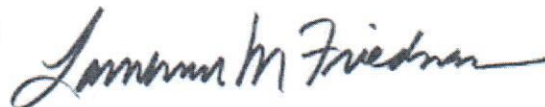
Except with respect to chain wrenches and other wrenches that do not have a socket or jaws and single handle, Customs has expressed no significant government interest in refusing to acknowledge the well-reasoned *Irwin* decisions and has identified no reason why refusing to apply the decision to similar merchandise is in the public interest. If Customs adopts a broad limitation on the application of the Court's decision, it will create inefficiency within the judicial process, burden the docket with unnecessary and unproductive litigation, and create additional interest expenses for the government. Consequently, Apex respectfully requests that CBP either fully abandon this proposal or specifically limit it to note that CBP will continue to classify merchandise **other than** locking pliers as wrenches provided it has a single handle and a means of engaging the work piece without applying compressive force to grip the item.

Should you have any questions, please do not hesitate to contact us.

Respectfully submitted,

BARNES, RICHARDSON & COLBURN

By:



Lawrence M. Friedman
Meaghan E. Vander Schaaf